IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2219 OF 2005

IN

SUIT NO.2468 OF 1986

UCO Bank. ...Plaintiff

vs.

1.M/s.Umesh Silk Mills & others. ...Defendants.

Mr.Kedar Dighe, for Plaintiff.
Mr.M.K.Nesari, for Defendants.

CORAM: D.K.DESHMUKH, J.

DATED: 19th December,2006..

P.C.:-

1. This is a notice of motion taken out by the defendants for setting aside the decree dated 12.7.2005. Perusal of the order dated 12.7.2005 passed by this Court whereby the decree is passed shows that the suit was filed by the bank for recovery of the amount given on cash credit facility and bill discounting facility which was extended by the bank to the defendants. Perusal of the record shows that a default

was committed by the defendants in making payment to the bank. Perusal of the order passed by the Court shows that the defendants have filed their written statement in the suit and they have admitted the claim made on behalf of the plaintiff, but the dispute is raised regarding the interest and they have claimed reduction in the liability on some counts. On behalf of the plaintiff, compilation of documents has been tendered, affidavit of evidence has also been filed. It appears that on several occasions the suit was before the Court and the Advocate appearing for defendants had expressed his inability to cross-examine the witness whose affidavit of examination in chief was filed on behalf of the plaintiff and he stated before the Court that he had no instructions from the defendants. In these circumstances, the Court after considering the material available on record has passed an order decreeing the suit. According to the plaintiff, this is an ex-parte decree and therefore, this notice of motion under Order IX Rule 13 of C.P.C. is maintainable. According to defendant no.2, in June,2005 through his son who was residing at Surat he came to know that two letters are received from their Advocate appearing in that suit and therefore, he should contact the Advocate. According to the defendants, they contacted their Advocates on telephone and he asked them to come down to Bombay. Accordingly, the defendants booked tickets for coming to Bombay on 2.7.2005 but they could reach Bombay on 11.7.2005 because of flood. According to them, before they

could take any effective step, the suit was decreed against them on 12.7.2005. The learned Counsel appearing for defendants relies on two judgments, one in the case of "Sohanlal Ruia and another Vs. Kedarnath Purushottamdas and Co. Pvt. Ltd and others, AIR 1969 Calcutta 516" contending that the decree dated 12.7.2005 is an ex-parte decree. He also relies on the judgment of the Supreme Court in the case of "G.P.Srivastava Vs. R.K.Raizada and others, AIR 2000 Supreme Court 1221" to claim that the reason given by the defendant for remaining absent on the date on which the decree is passed is only relevant.

2. Perusal of the order shows that the Court has noted that the matter was before the Court on several occasions. Perusal of the correspondence between the lawyer for the defendants and the defendants shows that by letter dated 7.6.2005 the son of defendant no.2 was informed by the lawyer that the matter was listed for hearing before this Court and that he had tried several times to contact him telephonically but he was unavailable and therefore, he was requested to contact the lawyer immediately. The next letter again addressed to son of the defendant no.2 dated 13.6.2005. Again he was informed that the matter was listed before the Court, even serial number on which the matter was listed is mentioned and he was requested to contact the lawyer immediately. By letter dated 27.6.2005, it appears that between

13.6.2005 and 27.6.2005 there was telephonic conversation between the second defendant and the lawyer and on telephone the lawyer informed the defendant no.2 that they have to make arrangement for engaging any other lawyer. He was also informed that the matter has been appearing before this Court for last three weeks. He was also informed that the next time when the matter will appear before the Court, the lawyer will apply for discharge. The defendant no.2 was requested to make alternate arrangement immediately to avoid inconvenience. This letter was admittedly received by the defendant no.2. But in the affidavit that is filed by the defendant no.2, the defendant 2 has not disclosed as to what he did after his lawyer told him one week before 27.6.2005 that he has to take immediate steps. He has said in his affidavit that he booked tickets for Bombay on 2.7.2005. There is no explanation to be found as to why he could not come to Bombay earlier though the lawyer had told him that in no uncertain terms he has to move at the earliest. It appears from the letter of lawyer dated 8.7.2005 that there was no communication from defendant no.2 to the lawyer even after receiving letter dated 27.6.2005. Therefore, by letter dated 8.7.2005 the lawyer informed the defendant no.2 that they will be mentioning the matter before the Prothonotary for taking discharge. The matter was before the Court on 12.7.2005. According to the defendant no.2, he was in Bombay on 12.7.2005. He does not state in his affidavit that the lawyer did not

inform him that the matter is before the Court on 12.7.2005. If the defendant no.2 was in Bombay on 12.7.2005 and he was in contact with his lawyer from 11.7.2005, it cannot be believed that the lawyer did not inform him that the matter is before the Court on 12.7.2005. When the defendant no.2 admittedly was in Bombay on 12.7.2005 he should have appeared before the Court but he has chosen not to appear. Therefore, even assuming that the decree passed by the Court though it is on merit, is an ex-parte decree, the reason given by the plaintiff for not appearing cannot be termed as sufficient cause. What is pertinent to note is that the suit is filed by the Nationalised Bank for recovery of the dues against the defendants and so far as the claim of the bank is concerned, in the written statement the defendants are not disputing that claim. Therefore, at the hearing of the motion I put it to the learned Counsel appearing for defendants that if the defendants are willing to deposit decreetal amount in the Court, the question of giving him an opportunity to contest the suit on merit can be considered. The learned Counsel states that without taking instructions he cannot make any statement. In my opinion, in the circumstance, if the defendants were keen on getting opportunity they should have themselves voluntarily made statement that they are willing to deposit the full or part of the decreetal amount in the Court. But the conduct of the defendant shows that after having utilised the public fund they just want to kill time and that is the sole purpose behind taking out

this notice of motion. The notice of motion is therefore, disposed of.